SUBMITTED TO WILBUR, DENMAN and MATHEWS, Circuit Judges. Denman, C.J. dissenting.

Nos. 9994 and 9995

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CITIZEN-NEWS COMPANY, A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

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National Labor Relations Board, petitioner

v.

The Citizen-News Company, a Corporation, respondent

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

To the honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and respectfully petitions this Court for a rehearing in the above-entitled causes. In support of its petition, the Board respectfully shows as follows:

On April 2, 1943, the Court, with one member dissenting, handed down its opinions setting aside the Board's orders.

We respectfully submit that the Court erred (1) in failing to give finality to inferences of the Board which were supported by substantial evidence, as required by Section 10 (e) of the Act and numerous decisions

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of the Supreme Court; (2) in holding that the Board's decisions conflicted in part with the decision of the Supreme Court in *N. L. R. B.* v. *Virginia Electric & Power Co.,* 314 U. S. 469; (3) in attaching significance to the asserted fact that respondent had desisted from some of its unfair labor practices prior to the issuance of the complaints herein; and (4) in attaching significance to the asserted fact that some of the Board's findings were not supported by appropriate allegations in the complaints.

I

In holding that there was no substantial evidence to support the Board's findings in this case, the Court has for the most part accepted the Board's subsidiary findings, which are firmly grounded in the record, but has rejected the inferences drawn by the Board, substituting therefor its own inferences. We submit that the Board's inferences were entirely reasonable and that in rejecting them the Court has radically departed from its proper function under the statutory scheme. The Supreme Court has "repeatedly held that Congress, by providing, in § 10 (c), (e), and (f) of the National Labor Relations Act, that the Board's findings 'as to facts, if supported by evidence shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's orders, and if the findings of the Board are supported by evidence the courts are not free to set them aside even though the Board could have drawn different inferences." *N. L. R. B.* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 106–107; *N. L. R. B.* v. *Waterman Steamship*

Corp., 309 U. S. 206, 208–209; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 597; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 343; *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282.

In Case No. 9994, the Board held that in 1937, respondent called into existence and dealt with committees of its employees in various departments, "in order to head off the organizational campaign of the Guild" (A. R. 133).[1] The Court treats this incident as collective bargaining on the part of respondent *with the Guild.* It thus rejects the Board's entirely reasonable inference that respondent's conduct at this point was the direct antithesis of bargaining with the Guild and constituted in fact an effort to avoid the necessity of engaging in such bargaining.

The Board's inferences with respect to the incidents involving Saturday work, the deprivation of by-lines, and other acts of reprisal against the Guild and its members, all of which were rejected by the Court, were, we submit, fully supported by the record. As to many of these incidents, the Court gave weight to certain factors which are totally immaterial, such as that the Guild was completely organized at the time of respondent's various attempts to disrupt its activities. Coercive conduct on the part of an employer is just as illegal when aimed at obliterating labor organizations which employees have already established as when aimed at preventing such establishment in the

[1] As in our main brief, references to the record in No. 9994 are designated by the symbol "A. R."; those in No. 9995 by the symbol "R."

first place. "The right of collective bargaining is * * * a continuing right" and "the Act guarantees to employees the continuous right to maintain labor organizations for the purposes of collective bargaining," even after a union has been organized and has entered into a contract with the employer. *N. L. R. B.* v. *Newark Morning Ledger Co.,* 130 F. (2d) 266, 267 (C. C. A. 3).

In setting aside the Board's finding that respondent discriminatorily discharged Lugoff, the Court, we submit, rejected an entirely reasonable inference of the Board. That inference was well supported, on the one hand, by the fact that Lugoff was the active leader of organization efforts in the classified advertising department, and, on the other hand, by the fact that the reasons assigned by respondent for the discharge were inconsistent and unsupported by the record, and hence, as the Board found, spurious. Neither of these considerations was mentioned by the Court, although it is well settled that the assignment of clearly false reasons for a discharge, of itself, lends potent support to a finding of illegal motive. *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 330–332; *N. L. R. B.* v. *Blanton Co.,* 121 F. (2d) 564, 570 (C. C. A. 8); *N. L. R. B.* v. *Burk Bros.,* 117 F. (2d) 686, 687 (C. C. A. 3); *Gamble-Robinson Co.* v. *N. L. R. B.,* 129 F. (2d) 588, 593 (C. C. A. 8); *N. L. R. B.* v. *Condenser Corp.,* 128 F. (2d) 67, 75 (C. C. A. 3); *N. L. R. B.* v. *Willard, Inc.,* 98 F. (2d) 244 (App. D. C.). The Court went further, however. It stated as a fact that "in seeking reemployment by the respondent Lugoff contended that he should not be worse

off than the strikers who had been returned to employment." This statement rests solely on the testimony of Palmer concerning his conversation with Lugoff at the time the latter applied for reinstatement in August 1938. Lugoff's testimony concerning this incident conflicted with that of Palmer, as we have shown in our brief (pp. 21, 25–26), *and the Board expressly accepted Lugoff's version of the incident* (R. 98–99). The impropriety of the Court's action in this connection is clear.

II

We submit that the Court erred in holding that certain portions of the Board's findings in the instant case conflicted with the decision of the Supreme Court in *N. L. R. B.* v. *Virginia Electric & Power Co.,* 314 U. S. 469. In that case, an employer had expressed views concerning the labor activities of its employees, without voicing actual threats or warnings that it would use its economic power to interfere with or control their activities. The Court held that a finding that such expressions, standing by themselves and separated from their background, were illegal was of doubtful validity. The Court was careful to point out, however, that "in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" (314 U. S., at p. 477). Moreover, the Court reaffirmed its earlier holding in *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 78 that "slight suggestions as to the employer's choice between unions may have

telling effect among men who know the consequences of incurring that employer's strong displeasure."

The Circuit Courts generally have recognized that the *Virginia Electric* decision does not preclude the Board from finding that an employer has violated the Act through "pressure exerted vocally." Such a contention was rejected by the Circuit Court of Appeals for the Seventh Circuit, in *N. L. R. B.* v. *Stone,* 125 F. (2d) 752, cert. den. 63 S. Ct. 44, where the Court stated (at pp. 755–756):

> We do not think it necessary, however, to discuss or decide the validity of the Board's conclusion with reference to these separate incidents [of interference, restraint, and coercion], because of the Board's general finding predicated upon events as a whole. In such a situation, the rationale of the *Virginia Electric & Power Company* case, as we understand it, has no application.

Accord: *N. L. R. B.* v. *Schaefer-Hitchcock Co.,* 131 F. (2d) 1004, 1007–1008 (C. C. A. 9); *N. L. R. B.* v. *M. A. Hanna Co.,* 125 F. (2d) 786, 790 (C. C. A. 6), and *N. L. R. B.* v. *Baldwin Locomotive Works,* 128 F. (2d) 39, 50 (C. C. A. 3), where the Court noted that "One's due accountability for the effect of his expressions is not a limitation upon his right to speak freely" (citing the *Virginia Electric & Power* case). Contrary contentions made by employers in recent petitions for certiorari have not been accepted by the Supreme Court. See *North Electric Mfg. Co.* v. *N. L. R. B.,* 123 F. (2d) 887 (C. C. A. 6), cert. den. 315 U. S. 818; *Norristown Box Co.* v. *N. L. R. B.,* 124 F. (2d) 429 (C. C. A. 3),

cert. den. 316 U. S. 667; *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), cert. den. 311 U. S. 705. See also *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. (2d) 753 (C. C. A. 7). Moreover, in the *Virginia Electric Power* case itself, the Circuit Court of Appeals for the Fourth Circuit, after the case was reconsidered by the Board in light of the Supreme Court's decision, upheld the Board's finding that the statements there involved were coercive and hence illegal. (132 F. (2d) 390, 392–395, cert. granted on another point, on March 15, 1943).

The directly coercive nature of many of the acts of respondent's agents here needs no elaboration. Brandon's warning that white collar workers would one day "go out and shoot" union men (Board's brief, p. 8) can hardly be considered as a mere expression of opinion. Similarly, Business Manager Young's statement that Killoran could not be "trusted" was a clear warning that her Guild activities had caused a change to her disadvantage in her status as an employee (Board's brief, p. 20). The same may be said of respondent's frequently voiced warnings that continued adherence to the Guild would result in cuts in wages and even discharges (Board's brief, pp. 13, 15).

Thus "the total activities of [the] employer" (*Virginia Electric* case, 314 U. S. at p. 477) fully justified the Board in finding in Case No. 9994 that—

> by the continuing expressions of criticism and disparagement of the Guild, the criticism of the use of outside negotiators, the attempt to secure contracts with employees' committees in the various departments, the threat to cut wages

> in the event that the classified-advertising employees failed to sign a contract, and the threat to discharge employees if a contract with the Guild was consummated respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (A. R. 135),

and in making its similar finding in Case No. 9995 (R. 93). In thus considering "the totality of the Company's activities during the period in question" (*Virginia Electric* case, 314 U. S., at p. 477), the Board considered precisely what the Supreme Court held that it had failed to consider in the *Virginia Electric* case.

III

In its opinion, the Court commented on the fact that respondent's discriminatory practices with respect to working on Saturdays (in Case No. 9994) and the deprivation of bylines (in Case No. 9995) had ceased prior to issuance of the Board's order. To the extent that the Court relied on this circumstance in setting aside the Board's order, it was clearly in error. The Supreme Court's decision in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, is controlling on this point. In that case, the employer had engaged in espionage, but had desisted therefrom prior to the institution of proceedings against it under the Act. The Supreme Court expressly held that that fact did not constitute grounds for ignoring the unfair labor practice which had taken place and that the Board "was entitled to bar its resumption" (305 U. S., at p. 230).

IV

In Case No. 9994, the Court indicated, generally, that none of the Board's findings with respect to Section 8 (1) were supported by allegations in the Board's complaint. Specifically, it noted that no charge was made in the complaint with respect to the action of Brandon in requiring the classified advertising department employees to work on Saturdays. Similarly, in Case No. 9995, the Court noted that the subject of bylines, although dealt with in the Board's decision, was not specifically mentioned in the complaint. We submit that the complaints in these two proceedings were entirely adequate to frame the issues resolved by the Board. In Case No. 9994, the complaint set forth numerous individual acts of interference and coercion on the part of respondent (A. R. 7–8), and alleged that by these acts respondent had refused to bargain collectively in violation of Section 8 (5) of the Act and that "by all said acts, and each of them," respondent had violated Section 8 (1) of the Act (A. R. 8). Clearly, the Board's dismissal of the 8 (5) allegation did not, as the Court implied, require it to dismiss the entirely distinct allegations as to Section 8 (1). In Case No. 9995, the complaint again set forth numerous individual actions constituting illegal restraint and coercion, and alleged that "by these and other acts" respondent had violated Section 8 (1) (R. 5–6). That allegation was entirely sufficient to support the Board's finding with reference to a matter on which evidence was given at the hearing, since no request was made for greater particularization of the complaint and there

was no showing of surprise or lack of opportunity to defend. *N. L. R. B.* v. *Yale & Towne Mfg. Co.,* 114 F. (2d) 376, 379 (C. C. A. 2). Accord: *N. L. R. B.* v. *Pacific Gas & Electric Co.,* 118 F. (2d) 780, 788–789 (C. C. A. 9); *N. L. R. B.* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 873 (C. C. A. 2), cert. den. 304 U. S. 576, 585; *Consumers Powers Co.* v. *N. L. R. B.,* 113 F. (2d) 38, 41–43 (C. C. A. 6); *N. L. R. B.* v. *Piqua Munising Wood Products Co.,* 109 F. (2d) 552, 557 (C. C. A. 6); *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.,* 111 F. (2d) 869, 873 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *N. L. R. B.,* 116 F. (2d) 760, 767 (C. C. A. 7), cert. den. 312 U. S. 680.

The Court's reliance on the asserted insufficiency of the complaints was improper for an independent reason. The Supreme Court has recently had occasion, in *Marshall Field & Co.* v. *N. L. R. B.,* 63 S. Ct. 585, to stress the importance of the "salutary policy adopted by Section 10 (e) affording the Board opportunity to consider on the merits questions to be urged upon review of its order." [2] With the exception of the matter of by-lines, respondent at no time urged before the Board or the Court that the complaints were insufficient. The question was never raised until the issuance of the Court's decisions herein. In thus raising this question *sua sponte,* at a time when the Board no longer had jurisdiction over the proceeding, the

[2] Section 10 (e) provides in part that—

"No objection that has not been urged before the Board, its member, agent or agency, *shall be considered* by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [Italics supplied.]

Court has frustrated the purpose of the provisions of Section 10 (e) referred to above, which is to enable the Board either to supply deficiencies in the record which are called to its attention or, if they cannot be supplied, to dismiss the complaint without further proceedings.

The findings of the Board, under the controlling decisions, are supported by substantial evidence, and its orders based thereon are valid and proper.

WHEREFORE, because of the importance of the questions involved, it is prayed that a rehearing of these cases be granted, and that on such a rehearing the Court grant full enforcement of the Board's orders.

Respectfully submitted.

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ERNEST A. GROSS,
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National Labor Relations Board.

CERTIFICATE OF COUNSEL

Comes now Robert B. Watts, General Counsel to the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for purposes of delay, and that he believes it to be meritorious.

/s/ ROBERT B. WATTS.
Robert B. Watts.

WASHINGTON, D. C., May 1943.

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